

PPA v. simulator - WEC, UK

GCA
4/2/82

MEMORANDUM OF PHILIP MORRIS INCORPORATED
TO THE FEDERAL TRADE COMMISSION
REGARDING REMEDIAL MEASURES
WITH RESPECT TO THE BARCLAY FILTER

- I. THE COMMISSION'S INDEPENDENT EXPERTS HAVE UNANIMOUSLY CONCLUDED THAT THE BARCLAY FILTER SUBVERTS THE COMMISSION'S CIGARETTE TESTING PROGRAM.

Over the past ten months, the Commission has conducted a thorough investigation to determine whether the Commission's current testing methodology accurately assesses the "tar" and nicotine delivery of cigarettes using the Barclay-type filter. Extensive data and reports have been submitted to the Commission by cigarette company research laboratories, outside consultants and independent testing organizations. This material has been painstakingly reviewed by three eminent experts in tobacco science, who were selected and retained by the Commission itself, for the purpose of obtaining totally objective, independent evaluations of the copious material presented in this investigation.

The results are now in, and the conclusion of the Commission's experts is unanimous and

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unequivocal: The bypass filter employed on Barclay cigarettes -- and now being used by Brown & Williamson on other heavily promoted brands -- functions one way in the Commission's smoking machine and in a radically different way in the smoker's lips. It ~~is designed to~~ exploit^s a loophole in the current FTC testing methodology to produce a smoking machine ranking in the ultra-low-delivery range, when, in fact, it delivers many times more "tar" and other constituents to the smoker than other cigarettes with the same machine ranking. In short, the Barclay-type filter is subverting the Commission's smoking machine, and, unless prompt corrective action is taken, it will continue to do so.

The distinguished scientists retained by the Commission have expressed their evaluation of the Barclay filter in clear, strong and unambiguous terms:

1. Dr. Lynn T. Kozlowski:

"I think that serious question does exist about Barclay and, further, I think that no additional

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research is needed to demonstrate that Barclay presents greater risks of high tar and nicotine yields to smokers than do other ultra-low tar brands."

(Kozlowski, "Report on Barclay," p. 1.)

"To summarize, I think that Barclay is not properly assayed by the FTC method and that it delivers tar and nicotine to smokers out of proportion to its ranking on the FTC lists." (Id., p. 15.)

"In my opinion, the PM, RJR, and B&W research strongly support the conclusion that Barclay delivers tar and nicotine out of proportion to the FTC rating. The ventilation system of the Barclay-type filter is susceptible to a special mode of compromise. The problem of these air-dilution channels creates a new loophole in the FTC method." (Kozlowski, "Supplemental Report on Barclay," last page.)

2. Dr. Michael R. Guerin:

"It is my carefully considered opinion that the contention of RJR and PM is correct in that the current FTC method does not appropriately rank the

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delivery of cigarettes containing a Barclay-type filter." (Guerin, letter of March 12, 1982, p. 1.)

"I am convinced that cigarettes containing the Barclay-type filter are inappropriately ranked by the current FTC testing method." (Id., p. 5.)

"I feel very strongly that the Commission should take steps to discourage the use of the Barclay-type filter or modify the testing procedure to more appropriately rank such products." (Id., p. 6.)

"I continue to feel that cigarettes fitted with the type of filter employed with the Barclay brand behave differently in the FTC machine than in the lips of a human smoker. In my opinion, the current FTC methodology underestimates the delivery of Barclay-type cigarettes." (Guerin, letter of March 19, 1982.)

3. Dr. Fred G. Bock:

"The preponderance of evidence indicates that Barclay cigarettes deliver more tar to smokers than would be expected on the basis of tar and nicotine

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levels determined by the current FTC method." (Bock Report, p. 1.)

"The data presented with respect to ventilation is convincing that Barclay cigarettes are smoked in a unique manner by humans. This behavior is apparently a consequence of filter design." (Id., p. 14.)

"The preponderance of data thus indicates that the present FTC tar and nicotine yield values of Barclay cigarettes are misleading." (Id.)

* * *

There can be no question as to the qualifications or the objectivity of the scientists retained by the Commission to review the technical material submitted in this investigation. Nor can there be any question as to the reasonableness and fairness of the process established by the Commission to resolve the scientific questions presented. That process has resulted in a clear-cut, unanimous conclusion that the current FTC testing methodology does not

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accurately rank brands using the Barclay-type filter.

The time has now come for strong remedial action.

II. PROMPT REMEDIAL ACTION BY THE COMMISSION IS
REQUIRED TO REDRESS THE DECEPTION
PERPETRATED BY USE OF THE BARCLAY-TYPE
FILTER.

The Commission should immediately take action to inform the smoking public of Barclay's duplicitous character and to protect the integrity of its "tar" and nicotine testing program. The Commission should take measures which will both dissipate the effects of the deceptive actions by Brown & Williamson and prevent the continuation or the recurrence of such actions.

In determining the remedial measures which should be taken with respect to the Barclay filter, the Commission should take note that Brown & Williamson has been aware since at least November 1980 that the Barclay filter distorts the dilution and, therefore, the yield of "tar" and other constituents, ^{of cigarettes} measured _{*/} by the Commission's testing procedures.

*/ Brown & Williamson has acknowledged that in November 1980 it received a demonstration of Philip Morris' dilution measuring device as well as other evidence of
[Footnote continued on next page.]

Moreover, the present proceeding has been pending for nearly ten months, since June 1981. During all of this time, Brown & Williamson has sold millions of packs of Barclay cigarettes and has reportedly spent in excess of \$150 million in advertising and promoting Barclay as an ultra-low "tar" brand. In particular, every pack of king-size Barclay cigarettes carries a conspicuous statement that the product delivers "1 mg[?] tar" -- a claim which the Commission's experts unanimously conclude is untrue and unfounded. The Barclay problem has been further exacerbated during the pendency of these proceedings by Brown & Williamson's introduction of two new product lines featuring the same bypass filter.

If the Commission does not immediately take vigorous action, its "tar" and nicotine reporting program could be irreversibly compromised, since

[Footnote continued from preceding page.]
the serious and substantial questions regarding the operation of the Barclay filter in the lips of human smokers. See, Submission to the FTC on Behalf of Brown & Williamson Corp., dated October 23, 1981, at p. 11.

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inaction in the face of the unanimous experts' conclusions would give other companies encouragement to evade and ^{subvert}~~sabotage~~ the program.

In light of the foregoing, Philip Morris respectfully submits that the Commission should promptly take the following remedial actions:

First, the Commission should forthwith issue a public announcement stating that it has determined, on the basis of unanimous reports from independent experts retained by the Commission, who are leading authorities in the field of tobacco science, that the "tar" and nicotine yield of cigarettes using the Barclay-type filter is not accurately measured by the present FTC method. This announcement should state that all of the experts consulted by the Commission agree that Barclay yields substantially higher "tar" and nicotine than advertised by Brown & Williamson, or reported by the FTC in its "Report of 'Tar', Nicotine and Carbon Monoxide of the Smoke of 200 Varieties of Cigarettes," dated December 15, 1981.

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The smoking public is entitled to be immediately informed of the experts' conclusion.

Second, the Commission should officially amend its December 1981 report to delete the results shown therein for the various varieties of Barclay cigarettes. The notice of such amendment should be published in the Federal Register and should be accompanied by the explanation that the actual "tar" and nicotine delivery of Barclay cigarettes is substantially higher than that set out in the report, for the reasons stated by the Commission's expert consultants.

Third, Brown & Williamson should be directed by the Commission forthwith to take the following action with respect to Barclay and all other brands using the Barclay-type filter: (a) to cease and desist from making any direct or indirect representations in its advertising, packaging or promotional materials as to the cigarette's "tar" or nicotine yield, including any representation or advertising

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claim that any such product is 99% "tar" free; and
(b) to incorporate a clear and conspicuous statement in all advertising, in lieu of the disclosure required by the voluntary agreement, and on every pack and carton of any such product to the effect that the cigarette's "tar" and nicotine delivery is substantially higher than the yields indicated by present FTC methods.

Fourth, if Brown & Williamson does not forthwith comply with such direction, the Commission should promptly file suit against Brown & Williamson in a federal district court, pursuant to 15 U.S.C. § 53, to obtain a preliminary and permanent injunction ordering the remedies described in the foregoing paragraph and such additional relief as may be appropriate to dissipate the effects of Brown & Williamson's false and misleading claims.

Fifth, Brown & Williamson should be ordered by the Commission forthwith to recall all cigarette packages and cartons presently in the market

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containing a legend or statement of Barclay's "tar" yield.^{*/} In addition, Brown & Williamson should be directed forthwith to recall and destroy all advertising and promotional materials which contain a statement of Barclay's "tar" and nicotine yield. The same relief should be granted with respect to all other brands which use the Barclay-type filter and make "tar" representations on packages^{or} cartons or in ~~advertising or promotional~~ ~~point-of-sale~~ material.

Sixth, in order to ensure valid and reliable comparative "tar" results for all cigarette brands on the market, the Commission's laboratory should promptly replace the cigarette holding device presently used in its apparatus with the holding device which has been proposed by Philip Morris. All cigarette manufacturers should be immediately notified of this modification and should thereafter be ~~required~~ ^{authorized}

^{*/} The largest selling variety of Barclay cigarette, the king-size soft pack, bears a conspicuous legend, on both the front and back panels, stating "1 Mg. Tar."

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to report results "by FTC method" only ~~in accordance~~ ^{when such}
~~with test~~ ^{are} results obtained using this holding device.

Respectfully submitted,

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April 5, 1982

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